85-259

Supreme Court, U.S.
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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD AMEEN MISLEH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

W. RODNEY DEVILLIERS, JR.
Counsel of Record
DEVILLIERS & DEVILLERS, INC.
4216 N. Portland, Suite 101
Oklahoma City, Oklahoma 73112
(405) 947-3044

Attorneys for Petitioner

August, 1985

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QUESTION PRESENTED

Whether the transcribed recorded interviews of Petitioner's estranged wife with Agents Paul Elledge and Tom Kemp of the Internal Revenue Service constituted *Jencks* and *Brady* materials, which, when production was denied by the trial court, resulted in a fundamental deprivation of due process to this Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Edward Ameen Misleh, requests the Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on the 20th day of May, 1985.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit appears in Appendix A to this Petition. No opinion was rendered by the trial court.

JURISDICTION

The Petitioner is seeking a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in order to review a judgment entered on May 20, 1985, affirming a Judgment and Sentence of Conviction entered by

the United States District Court for the Western District of Oklahoma on January 5, 1984. A timely Petition for Rehearing was filed by Petitioner with the United States Court of Appeals for the Tenth Circuit and the same was denied by the Circuit Court on June 19, 1985. A copy of Petitioner's Petition for Rehearing and the court's denial of the same are attached as Appendix B and C respectively. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution as defined by *Brady* v. *Maryland*, 373 U.S. 83, at 87:

> "We now hold that the suppression . . . of evidence favorable to an accused upon request, violates due process where the evidence is material either to guilt or to punishment, . . ."

STATEMENT OF THE CASE

A. Procedural Background of the Case

Petitioner was indicted September 6, 1983 by Federal Grand Jury in the Western District of Oklahoma in a Three-Count Indictment. The Petitioner was charged under all three counts with possession of controlled substances with intent to distribute in violation of Title 18 U.S.C. 841(a)(1). The Petitioner moved the court for an Order directing production by the Government of certain *Jencks* and *Brady* material to be provided to the counsel for the Defense and said Motion was granted and an Order issued by the Honorable Lee R. West concerning all discovery and cut-off schedules for production.

The Petitioner was tried by a jury and found not guilty of the Felony Counts but guilty of three Counts of lesser included offenses of simple possession of three separate controlled substances. The lesser included offense intruction was requested by counsel for the Defense during the trial of the case after a Motion for Mistrial was made by counsel for the Defense which will be explained in more detail within this Petition. As an adjunct to the defense Motion for Mistrial the court reviewed certain documents then in the possession of the Government which had been withheld from the Defense in spite of the court's discovery Orders, several of which, namely D.E.A. 6 reports of Agent Mel Ashton, were provided to the counsel for Defense after *in camera* review. A two hundred-plus page transcription of interviews conducted by the Norman Police Department and Agents of the Internal Revenue Service with Petitioner's estranged wife were likewise reviewed *in camera* but withheld from the Defense by the court. Upon the verdict of the jury, the court rendered Judgment and Sentence against this Petitioner for one (1) year in prison on Count I to run consecutively with one (1) year in prison on Count II and one (1) year on Count III to run concurrently with Counts I and II. The Petitioner was likewise ordered to pay a fine of $5,000.00 on Count I and $5,000.00 on Count II. A timely Appeal was filed with the United States Court of Appeals for the Tenth Circuit and Judgment was rendered by that Court on May 20, 1985.

B. Relevant Facts Material to a Consideration of Questions Presented

On February 16, 1983, Petitioner, upon his return to his home in Norman, Oklahoma from a trip to Dallas, Texas, discovered that his dog had been seriously injured and his residence burglarized. He immediately called the Norman Police Department and reported the burglary. At that point in time the Petitioner was unaware that he had been the subject of surveillance by the Norman Police Department for approximately five months. He admitted the investigating officer to his residence and to all rooms thereof and it was determined that the break-in had occurred through his back entry and numerous items taken from his gun case located in the den-office maintained at his residence. Petitioner further was unaware that his estranged wife had given extensive taped interviews to Agents of the Internal Revenue Service (Elledge and Kemp) and to various members of the Norman Police Department.[1] The "burglary" was never solved.

On the evening of February 16, 1983, Petitioner was working at his business establishment, Walter Mitty's Club, when he was arrested by four officers, handcuffed and taken to the Norman Police Department at approximately eight (8) o'clock. Simultaneous with his arrest, 16 Norman Police Officers operating under a State Search Warrant and eight Agents of Internal Revenue Service operating under a Federal Search Warrant jointly entered his residence.

---

[1] These transcripts, concealed by the Government until after the trial, interestingly contain a suggestion of just such a break-in through the back entry. (Tape 4, Side 1, pp. 8-9, 2/14/83)

The Federal Officers, pursuant to the Federal Warrant, seized books of account, a gold coin collection, $840.00 of rolled quarters and "reportedly" $71,000.00 in currency. The coin and currency was taken from a safe in Petitioner's den-office and the books of account were taken from his file cabinet. The Federal Warrant had been issued on that day based upon alleged Income Tax Violations attributed to Petitioner. I.R.S. Agent Paul Elledge, the person to whom the Warrant had been issued, obtained the combination to Petitioner's safe by telephone from him at a time when he was in custody, still handcuffed at the Norman Jail. Agent Elledge likewise was requested by Petitioner Misleh not to carry out a threat to blow the safe since there was *over $100,000.00 in currency* inside. As it later developed, Agent Elledge and Agent Kemp had been previously advised that *$110,000.00 in currency* was contained in the safe by Misleh's wife. She likewise came to the residence during the 5-hour "search" and with the assistance of Norman Police removed certain items and remained for a time in the residence and in Petitioner's van. During the search, Petitioner's invalid mother and older brother were denied access to the residence when they requested an opportunity to observe the rummaging operation being conducted.

The Norman Police in the course of the 5-hour search seized property from the residence allegedly including less than one-quarter ounce of cocaine (Count I in the subsequent Indictment), 39 Quaalude tablets (Count II) and 100 Valium tablets in a sealed bottle (Count III). In addition, and most importantly, a larger quantity of a *white powdery substance* was taken from a *blue tackle box* on a shelf above Petitioner's safe in his closet. Analysis proved this

substance to be non-scheduled and non-narcotic, *the possession of which was not illegal!* No State charges were filed relative to the scheduled substances taken from the closet. The Norman Police in executing the State Warrant seized numerous items which had been specifically stricken from the Search Warrant by the issuing Magistrate (State Judge Hetherington) and, in fact, all evidence seized pursuant to the State Search Warrant was subsequently ordered suppressed by District Judge E. M. McDaniel in Cleveland County, Oklahoma.

No inventory of the items taken pursuant to the Federal Search Warrant was made in the presence of Petitioner nor was he furnished with the same. The Return on the Federal Warrant was made some *six days later*. The Return reflected the seizure of approximately $70,000.00 in currency, some $40,000.00 *less* than the Federal Agents had been advised was in the safe. The affidavit supporting the Search Warrant was ordered sealed. This remained sealed until September 15th although Government Witness Mel Ashton somehow obtained a copy the previous April.

The Forfeiture Action

Thereafter, Petitioner filed a civil action seeking the return to him of items (principally currency and coins) seized pursuant to the Federal Warrant. This action, Misc. No. 53 and Magistrate Docket 83-516L, resulted in an Evidentiary Hearing before U. S. Magistrate Howland with the Petitioner contending that without audit or assessment the seizure of currency by the Internal Revenue Service was illegal and improper. Prior to a decision, and at a time when Petitioner was attempting discovery, the Resident

Agent in charge for the Drug Enforcement Administration, Mel Ashton, recommended the filing of a Forfeiture Action naming $69,400.00 in Currency as the Defendant (CIV-83-1116-E) and the Magistrate Proceedings were consolidated with this action. Upon the filing of the Forfeiture Proceeding, the Defendant Currency was "arrested" by the United States Marshal. This Currency, as turned over by the I.R.S. to the Marshal, was contained in six manila envelopes which bore writing and computations under scotch tape seals and consisted in the main of $100.00 bills. The manila envelopes, as later was determined, *were destroyed* by the Marshal and the currency was deposited in the Federal Reserve Bank. This action was taken in spite of Petitioner's previous request in the Magistrate's hearing that the currency be photographed and the serial numbers recorded and the manila envelopes maintained in the same condition as when the seizure occurred.

The Honorable Luther Eubanks, District Judge, Western District of Oklahoma, refused the Government's request to stay discovery in the Forfeiture Action. In July 1983, the Internal Revenue Service wrote the Petitioner that they had determined that *no criminal action* would be pursued against him. Thereafter, Petitioner, in the Forfeiture Action, served notice requiring the Deposition of I.R.S. Agents Elledge and Kemp and Resident Agent Mel Ashton of the D.E.A. as well as various officers from the Norman Police Department. The Internal Revenue Service made arrangements to return $1,800.00 in currency, $840.00 in rolled quarters and the gold coin collection to the Petitioner with the return to be made at Petitioner's Attorneys Office on *August 17*, 1983.

The Criminal Charges

After Resident Agent Ashton received an agreed delay in his Deposition, he, on *August 16*, 1983, exactly six months subsequent to the ransacking searches of Petitioner's home, filed an Information Complaint in the United States District Court (Mag. No. 83-590-L) charging Misleh with a single alleged violation of Title 21 U.S.C. §841(a)(1) as possessing approximately one-quarter ounce of cocaine With Intent To Distribute. Misleh was arrested at his home on the evening of August 16th by Agent Paul Elledge of the I.R.S. and Resident Agent Ashton, the Complaining Witness. He was refused an opportunity to call his attorney and was held in jail overnight. The following morning Misleh, upon arraignment on the single Count Criminal Information, was released on his own recognizance and a Preliminary Hearing was set for September 6, 1983. On Septetmber 6, 1983, the three-count Indictment, on which he stood trial, was returned by the sitting Grand Jury and the single-Count Complaint was dismissed. On August 17, 1983, following the arraignment on the single-Count Complaint, Misleh and his attorneys met with Agents of the Internal Revenue Service and approximately $1,800.00 in currency including many $100.00 bills and $50.00 bills, and $840.00 of rolled quarters and a portion of a gold coin collection was returned to him by the Internal Revenue Service.

When Misleh was arraigned on the three-Count Indictment, both the Government and he were given a copy of the standing discovery order issued by the Honorable Lee R. West to whom the Criminal Charges were assigned for trial. Judge West also had been assigned the responsibility for hearing the Forfeiture Action (CIV-83-1116-W) *which*

was tried subsequent to the Trial, Judgment and Sentencing in the Criminal Case.

Likewise, at this point in time, Misleh's attorneys learned and were advised by the United States Marshal's Office that the manila envelopes containing the seized currency, which had writings exculpatory of the charges, had been destroyed and the currency itself deposited in the Federal Reserve Bank without a listing of the serial numbers being made. Petitioner's Motion to Dismiss based upon the admitted destruction of this vital evidence was thereafter overruled.

Brady and *Jencks* Materials were required under Judge West's Order to be furnished the Defendant by September 15, 1983. It later was determined, during cross-examination of complaining witness Ashton at the trial of this cause, that the Prosecution not only failed to turn over *three reports* to the Petitioner, but in fact, actively concealed them. Judge West belatedly ruled these to be relevant *Jencks* material and that their disclosure should have been made but applied no other sanctions. This material, which could have been used to impeach the credibility of key Government witnesses, had been consciously, actively and deliberately concealed.

In fact, witness Mel Ashton, during trial on a nodded signal from the Assistant District Attorney, volunteered a hearsay rumor by a "confidential informant" that Petitioner had, some six months prior to the search and seizure, purportedly negotiated for the purchase of a kilo-size quantity of cocaine. This was intended to prejudice the jury, and, after Petitioner's Motion for Mistrial or Acquittal was over-

ruled, *directly precipitated his request for a lesser included offense Instruction (given over objection by the Government)*. This volunteered "rumor" was later, at the trial of the Forfeiture action in April of 1984, found to be completely and wholly discredited.

Thus, it is not only obvious but conclusive that had the Prosecution not actively concealed these materials from Petitioner's counsel he would have been able to effectively and absolutely refute the Government's case and establish beyond any question of a doubt that Petitioner was not guilty of the felonies as charged. The credibility of the key Government witness and his Confidential Informant whom the Government used to establish intent, would have been completely destroyed as subsequently occurred in the trial of the Forfeiture action.

The Taped Interviews

Extensive taped interviews with Petitioner's estranged wife were in the possession of the Prosecution but *were not furnished* to Petitioner's counsel in spite of *in camera* review during the criminal trial. Judge Lee R. West, in his review during trial, ruled that the transcriptions were neither covered by *Jencks* nor *Brady*, which upon careful reading is a clearly erroneous ruling which has denied this Petitioner his constitutional right of confrontation.

These "interviews" were conducted by members of the Norman Police Department and Agents of the I.R.S. — Paul Elledge and Tom Kemp — both of whom testified as Government witnesses in the criminal case at bar. *These "interviews" contained statements by both of these Government*

witnesses which could have been used effectively to impeach their credibility before the sitting trial jury. This not only relates to statements by Jeanne Misleh, wife of Petitioner, concerning the fact that the only white powdery substance stated to be at Petitioner's residence (Government's Exhibit "1A") was a non-narcotic non-scheduled substance which was contained in a *blue tackle box* in the closet — as opposed to a clear plastic bag on top of Petitioner's safe as developed at trial. There are numerous statements exculpatory of the charges stating over and over that Petitioner was not a dealer in drugs but possessed the white powder in the *blue tackle box* for his own personal use.

Moreover, Petitioner contended from the outset that approximately $40,000.00 in currency was missing from what was belatedly reported on the Search Warrant Return as having been seized from his safe. The taped interviews indicate beyond question that Agents Elledge and Kemp were aware of and participated in a scheme with Petitioner's wife to steal money during the search of the home. Quoting from the transcript at page 90:

> "Kemp: And they closed, they've been closed down by snow and we've been having, we've been having a hell of a time. Uh, do you have any money gathered up yet?
>
> CI: (Jeanne Misleh) No, I don't. I ain't got money. I don't have any.
>
> Kemp: Now what I'm trying to say is now, you're still planning on going down there when we serve the warrant and go on to the van and get the money, right? Okay, Paul knows that. I told Paul about that. Is the money still in the safe?

CI: Yes. I did not see him take any out."

At page 113:

"Moody: Yeah, that's what I was thinking, cause the phone will probably be ringing.

Kemp: Yeah, that's what I'm saying, that's why we'll be ready to pop him. You know, that's why Paul and them will be ready to take him. As soon as you tell them, if some, if you get spooked about something, what's that? The money in the, in the truck?"

At trial Agents Elledge and Kemp denied any such plan, notwtihstanding the clear language subsequently revealed to Petitioner on the tapes. These transcripts at trial thus would have destroyed their credibility and were likewise highly exculpatory as evidence crystallizing the defense of a set-up or plant of drugs to cover a theft of money by the Agents and Mrs. Misleh. (Tape 4, S.1, p. 15, S.2, pp. 13, 20-21)

Thus, not ony did these *taped interviews* constitute *Jencks material* in relation to Government witnesses Elledge and Kemp, but they also contain *Brady statements* highly exculpatory of the charges. In addition, numerous statements by the estranged wife and by the interviewing officers would lend credence to the defense theory at trial that the minute amount of controlled substances, the subject of the charges, were actually planted by certain Agents and Officers to cover up what Petitioner contended and still contends was the theft of approximately $40,000.00.

Although reviewed by Judge West during the trial, the 200-plus pages of transcription was denied the Defense

Counsel until November 10, 1983 as discovery in the Forfeiture Case against $69,400.00. In April of 1984, subsequent to the Judgment and Sentence of conviction herein appealed, the Forfeiture action as instituted by Agent Ashton was tried to the Honorable Lee R. West. *Judge West at that time utterly rejected the Government's claim of forfeiture* and in his Findings determined that the "confidential informant", used in Resident Agent Ashton's testimony as a harpoon in the case at bar, was completely and totally discredited. Judge West further ruled that there was no evidence of any nature linking the $69,400.00 sought to be forfeited to any drug transaction, and in fact, statements in the taped interviews of Petitioner's estranged wife were quite to the contrary. These exculpatory statements of Mrs. Misleh were in direct contradiction to the utilization of testimony concerning the money seized and photographs of the money taken in the search to prove or attempt to prove intent at the criminal trial.

Thus, not only did the Forfeiture Action result in the return to the Petitioner of the $69,400.00 together with interest and costs, but it provided a rare proven example of the prejudice which can be visited upon a criminal defendant when the prosecutors consciously and actively conceal *Jencks* and *Brady* material in violation of the requirements of the Federal Rules, and a trial court must hurriedly review *in camera* those materials and make rulings which are subsequently shown to be so clearly erroneous.

REASONS FOR GRANTING THE WRIT

THE REASONS FOR GRANTING THE WRIT ARE THE PATENT AND MATERIAL VIOLATIONS OF THIS PETITIONER'S CONSTITUTIONAL RIGHTS OCCASIONED BY THE TRIAL COURT'S DENIAL OF THE TAPED INTERVIEWS HELD BY THE PROSECUTION.

Whether the transcribed recorded interviews of Petitioner's estranged wife with Agents Paul Elledge and Tom Kemp of the Internal Revenue Service constituted *Jencks* and *Brady* materials, which, when production was denied by the trial court, resulted in a fundamental deprivation of due process to this Petitioner.

It can be stated with no equivocation that the verbatim transcriptions of the Government's witnesses, Kemp and Elledge, and the statements contained in the interviews of Petitioner's estranged wife, fall squarely within the purview of the mandates of this Court and its interpretations of the Jencks Act together with the long line of cases beginning with *Brady* v. *Maryland,* 373 U.S. 83 (1963). The trial court, obviously in its hurried review of the two hundred-plus pages of transcribed interviews during trial, failed to comprehend the gravity and materiality of the excerpts herein quoted and others contained in the transcripts. The Petitioner urges this Court to issue its Writ to the Tenth Circuit Court of Appeals for review of this case also upon the misapprehension by the Appellate Court as to the thrust of this Petitioner's Appeal.

The Tenth Circuit cited *United States* v. *Strahl,* 590 F.2d 10 (1st Cir. 1978), *cert. den.* 44 U.S. 918 (1979); and made the comment in its Order and Judgment that "we do

not perceive any real dispute on the issue of whether Appellant 'possessed' the items in question, nor is there any real dispute that the items were controlled substances". The Appellate Court, however, has totally failed to "perceive" the significance of the statements of the Government Agents and their obvious involvement with Petitioner's estranged wife by their own words, to take money from the residence of Petitioner during the search that was conducted.

With the motivation of theft it is obvious to this Petitioner that had he been provided with the statements quoted herein concerning taking money from his residence on the night of the search, the sitting jury, which was in fact convinced that he did not possess the drugs with intent to distribute them, would have been challenged and convinced that the theory of this Petitioner's defense was sound and that the plant of the controlled substances which were in fact seized from the residence, were planted there in order to cover up the theft of over $40,000.00 from this Petitioner. Obviously the jury was not convinced that this Petitioner was a drug dealer; but the insurmountable task of this Petitioner in his defense at trial was to refute the fact that controlled substances were seized at his home. It is also obvious that those controlled substances did exist but their origin and how they came to be at the Petitioner's home was something that this Petitioner asserted to the sitting jury but was unable to prove until the time that these transcriptions were made available to him after his conviction.

The trial court was required to review in one evening two hundred pages of transcriptions and it is respectfully submitted that the Honorable Lee R. West simply was un-

able to ferret out the minute but highly exculpatory matter which we now present to this Honorable Court for its review. It is likewise apparent that the Appellate Court misapprehended the thrust of this Petitioner's case on appeal inasmuch as their Opinion recites that they could not perceive any dispute as to the possession of the controlled substances. Had this Petitioner been afforded his constitutional rights as defined by this Court in *Brady* v. *Maryland, supra,* and its progeny, this Petitioner could have presented to the sitting jury a reasonable and viable explanation for the existence of the controlled substances in his home on the night of the search. Therefore, with a reasonable and explainable justification for the existence of those controlled substances, we believe that the jury would have been possessed of a reasonable doubt as to this Petitioner's possession of the controlled substance for which he has been convicted.

CONCLUSION

The failure and refusal to provide the *Jencks* and *Brady* materials denied the Petitioner his constitutional right of confrontation and his right to effective assistance of counsel. To prevent this miscarriage of justice the Writ should issue to the Tenth Circuit to permit further review by this Honorable Tribunal.

Respectfully submitted,

W. RODNEY DEVILLIERS, JR.
Counsel of Record
DEVILLIERS & DEVILLERS, INC.
4216 N. Portland, Suite 101
Oklahoma City, Oklahoma 73112
(405) 947-3044

Attorneys for Petitioner

August, 1985

APPENDICES

APPENDIX A

[Filed May 20, 1985]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 84-1512
	)	(D.C. No. CR-83-215-W)
v.	)	
EDWARD AMEEN MISLEH Defendant-Appellant.	)	(W.D. Okla.)

ORDER AND JUDGMENT

Before SEYMOUR and McWILLIAMS, Circuit Judges, and WINDER, District Judge.*

Edward Ameen Misleh was charged in the first count of a three-count indictment with the unlawful possession of cocaine with an intent to distribute, in violation of 21 U.S.C. § 841(a)(1). In the second and third counts of the indictment he was charged with the unlawful possession of Qualude, a controlled substance, and Valium, both with an intent to distribute, in violation, in each instance, of 21 U.S.C. § 841(a)(1). A jury acquitted Misleh of possession with an intent to distribute, as to each of the three counts. However, at the request of Misleh, and over objection of the prosecution, the jury was given instructions, and forms of verdict, concerning the lesser included offense of possession of the controlled substance, but without an intent to distribute, as to each of the three counts. The jury convicted Misleh of possession of the cocaine, Qualude, and Valium. Misleh appeals. We affirm.

*Honorable David K. Winder, United States District Judge for the District of Utah, sitting by designation.

Misleh's residence was searched, simultaneously, by both federal and state agents acting pursuant to warrant. The federal authorities were searching for records and monies relating to possible tax violations, and the state authorities were searching for drugs and controlled substances. In the trial court, Misleh filed a motion to suppress the use at trial of the controlled substances taken in the search of his home. After hearing, the motion was denied. On appeal, this ruling of the trial court refusing to suppress the controlled substances taken in the search was assigned in appellant's opening brief as error. However, in its reply brief, appellant stated that the "issue will not be further argued," and at oral argument, counsel, believing that Illinois v. Gates, 462 U.S. 213 (1983) was controlling, for all intents and purposes, abandoned this particular issue. We agree that the trial court's denial of appellant's motion to suppress was not error. *See id.*

On appeal, the primary matter urged as grounds for reversal is the government's alleged failure to produce certain documents as required by the Jencks Act, 18 U.S.C. § 3500 and Brady v. Maryland, 373 U.S. 83 (1963). The trial court considered this mater, both during the trial proper and later in post-trial hearings and rejected appellant's argument. We find no error in this regard. The materials in question, according to counsel, would have been used to impeach three government witnesses and would have altered defense counsel's cross-examination of those witnesses. However, such related, in the main, to the question of whether appellant had an intent to distribute any of the three controlled substances. According to counsel, the materials in question consist of a report prepared by a government witness, Ashton, detailing appellant's cocaine dealings and transcripts of interviews between appellant's wife, who was a government informant, and government agents. The jury has acquitted appellant on the charges that he possessed any controlled substance with an intent to distribute, and he was only convicted on the

lesser included offense of mere possession of the controlled substances in question. Concerning the conviction for mere possession, we do not perceive any real dispute on the issue of whether appellant "possessed" the items in question, nor is there any real dispute that the items were controlled substances. *See* United States v. Strahl, 590 F.2d 10 (1st Cir. 1978), *cert. denied,* 440 U.S. 918 (1979).

Appellant also urges that his motion to dismiss the indictment should have been granted, because the serial numbers from monies seized during the search of his home were not recorded by the government and because the marked envelopes which held the bills were discarded. Appellant claims that, had these serial numbers and envelopes been provided to him, he could have contradicted the government's theory that the money was involved in the trafficking of narcotics. Appellant's argument, however, again relates to the charges of possession with intent to distribute, of which he was acquitted. Appellant has thus not shown any resulting prejudice to his case, and we find no error in the district court's ruling in this regard. *See* United States v. Quintana, 672 F.2d 296 (10th Cir.), *cert. denied,* 457 U.S. 1135 (1982).

Judgment affirmed.

HOWARD K. PHILLIPS, Clerk

By *Robert L. Hoecker*
Chief Deputy Clerk

APPENDIX B

[Filed June 5, 1985]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA Appellee	)	No. 84-1512
vs.	)	(D.C. No. CR-83-215-W)
EDWARD AMEEN MISLEH Appellant	)	(W.D. Okla.)

PETITION FOR REHEARING

COMES NOW Defendant/Appellant, Edward Ameen Misleh, and petitions this Honorable Court for a Rehearing of the Court's Order and Judgment filed herein on May 20, 1985 and in support hereof states the following:

ISSUES

1. That the Order and Judgment entered by Circuit Judges Seymour and McWilliams and Winder, District Judge* fails to properly treat and assess the lower Court record herein and has completely failed to treat or determine the issues raised by Defendant/Appellant both in the Briefs filed herein and argument before this Honorable Panel.

2. That the lower Court record and the issues before this Court clearly point to the fact that the systematic failure to produce both Jencks and Brady material to Defendant's counsel in a timely and required manner, together with the rehearsed— signaled — harpoon answer supplied by complaining witness Ashton, thus required *defense* coun-

*Honorable David K. Winder, United States District Judge for the District of Utah, sitting by designation.

sel to request the lesser included offense instruction. The withheld documents (and the destroyed envelopes and serial numbers connected with the currency) would have conclusively destroyed the Government's case in chief and *thus the lesser included offense instruction would not have been requested.* The trickery and calculated deviousness practiced by the prosecution at the trial level herein not only denied the Defendant a fair trial but imposed unfairness upon him.

3. That this Honorable Panel has failed to perceive, treat or respond to the position of Defendant/Appellant herein, that the trickery and blatant violation of the requirement of Jencks and Brady at the trial level rendered effective assistance of counsel impossible.

4. That this Court's Order and Judgment contained the statement "we do not perceive any real dispute on the issue of whether appellant 'possessed' the items in question" is a misapprehension of the content and impact of the documents and material which were intentionally withheld from defense counsel below. Specifically, the statements by Appellant's estranged wife in recorded interviews with Government agents referred to a "controlled substance" by specific description and location ("in a blue tacklebox") which the Government's own analysis proved to be not a controlled substance at all. Thus, Defendant/Appellant's contention throughout that the controlled substances were planted pursuant to a plot to steal $40,000.00 from him would have been buttressed and corroborated. These statements were in fact exculpatory, not only of possession with intent but of "mere possession" itself.

5. Had the trial court granted a mistrial at the point in time when the withheld Jencks materials were revealed, this would have conclusively resulted in the subsequent acquittal of the Defendant on a re-trial if attempted by the Government without any "lesser of two evils request" for the included offense instruction. This was uniquely demon-

strated by the subsequent Forfeiture Action decision which again the panel failed to assess, treat or apply in its Order and Judgment herein.

6. That the Defendant/Appellant was denied his Constitutional Rights to a just and fair trial and this Court's stamp of approval by its failure to treat the issues raised herein should not be permitted to stand.

ARGUMENT AND AUTHORITY

The Order and Judgment of the Panel herein completely failed to address the issues of this Appeal that the calculated and deliberate withholding of both Jencks and Brady materials at the trial level denied the Defendant/Appellant effective assistance of counsel. The fact that the subsequently tried Forfeiture Action wherein these materials were available and effectively utilized, was decided in all respects in Appellant's favor presents a unique demonstration of the materiality and importance of the deliberately withheld materials. This removes from the realm of speculation, the fact that the deliberate denial of these materials effectively denied the Defendant/Appellant a fair trial.

It should stand without question, that from a defense viewpoint the inclusion of a "lesser included offense" instruction may encourage a jury to return a "compromise verdict" on a charge carrying a lighter sentence. Requesting and submitting such an instruction without question increases the likelihood that a Defendant will be convicted of *some crime*. This is not a "tactic" which is routine, but only is done after full consideration of all facts. Timely Jencks and Brady compliance would have strongly militated against such a request by Defense Counsel. Effective assistance of counsel was thus prevented!

The withholding of these materials and the calculated unfairness, resulting therefrom, was exacerbated by the rehearsed harpoon answer given by the Government witness

Ashton after a nodded signal from the prosecuting attorney to the effect that the Defendant had previously negotiated a kilogram size purchase of cocaine from a Government informant. This was conclusively demonstrated to be false as was made explicit by subsequent Findings entered in the Forfeiture Action by the Honorable Lee R. West, District Judge. This same destruction of credibility would have certainly occurred in the trial of the criminal case and with such evidence available Defense counsel, under such circumstances would not have requested the lesser included offense instruction.

The taped interview statement of Defendant/Appellant's estranged wife with Norman Police and I.R.S. Agents was replete with references to what was assumed to be cocaine as being contained in the *blue tacklebox* in Defendant's closet. This, the Government's analysis proved, was not a controlled substance. Moreover, the outline of the scheme and plot to steal $40,000.00 from Defendant's safe was likewise shown to have had its conception in the course of these interviews. This coupled with numerous statements in these interviews that the Defendant was not a "dealer" and never bought and sold controlled substances, would or should have resulted in a directed verdict of acquittal on the charge contained in the Indictment.

It is strange to note that the Order and Judgment of the Panel in this case makes no reference whatsoever to the subsequent Findings and Conclusions in the Forfeiture Action which conclusively demonstrate the effective utilization of the improperly withheld Jencks and Brady materials.

The foundation of the holding in *Jencks* v. *U. S.*, 353 U.S. 657 (1957) was on the basis that *the withholding of such statements prevented effective assistance of counsel.* This holding directly precipitated the passage of the Jencks Act and the requirements of F.R.C.P. 26.2. When a Defendant thereby has his constitutional rights of confron-

tation restricted and impaired, the effective assistance of counsel is thereby prevented. This has, without question, occurred in the case at bar and this issue of constitutional dimension which the Panel failed to even refer to in its Order and Judgment requires a reversal of Appellant's conviction. (*Krilich* v. *U.S.*, 1974, 502 F.2d 680, Cert. Den. 420 U.S. 992)

This Court's statement that no issue in relation to mere possession was perceived is inaccurate and completely at odds with the record. The withheld interview statement, which Defendant/Appellant's counsel did not receive until a month subsequent to the trial of this cause, clearly demonstrated that not only did Appellant's estranged wife repeatedly state he *was not* a dealer in controlled substances, but also stated clearly, over and over, that the only white powdery substance at Appellant's residence was that contained in the *blue tacklebox*. This proved to *be* [*sic*] a non-narcotic, non-scheduled, non-controlled substance by the Government's own analysis. Thus, even the question of "mere possession" was certainly involved in the deliberately withheld materials, contrary to the perception and assumption in its Order and Judgment herein.

Wherefore it is respectfully urged that the application of simple fundamental fairness should convince this Court to reverse Appellant's conviction and if necessary Order a retrial with the Appellant at that point having all such systematicly withheld documents and materials available for defense of the charges. More appropriately, the obvious misconduct involved should require a reversal with instructions to dismiss.

In any event, it is respectfully urged that fundamental fairness requires that the Panel reconsider its Order and Judgment herein wherein the obvious pertinent issues raised in this appeal were not addressed and grant a re-

hearing of this cause so that appropriate decision on the issues raised may occur.

Respectfully submitted,

DeVilliers & DeVilliers, Inc.
By *W. Rodney DeVilliers, Sr.*
4216 N Portland, Suite 101
Oklahoma City, Ok. 73112
Attorneys for Appellant

[Certificate of Mailing omitted this printing]

APPENDIX C

MAY TERM — June 19, 1985

Before Honorable Stephanie K. Seymour, Honorable Robert H. McWilliams, Circuit Judges, and Honorable David K. Winder*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 84-1512
EDWARD AMEEN MISLEH, Defendant-Appellant.	)	

This cause comes on for consideration of appellant's petition for rehearing filed in the captioned matter.

Upon consideration whereof, appellant's, Edward Ameen Misleh, petition for rehearing is denied.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

*United States District Judge of the United States District Court for the District of Utah, sitting by designation.